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Supreme Court, U.S.
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No. 97-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PALADIN ENTERPRISES, INC.,
Petitioner,
v.

VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER PALADIN ENTERPRISES, INC.

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14 pp

TABLE OF AUTHORITIES

CASES — Page

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 9
Bond v. Floyd, 385 U.S. 116 (1966) 7
Brandenburg v. Ohio, 395 U.S. 444 (1969) ..... *passim*
Carey v. Population Services International, 431 U.S. 678 (1977) 3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 4, 9
Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997) 6
Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) 3, 4
Hess v. Indiana, 414 U.S. 105 (1973) 3
High Ol' Times, Inc. v. Busbee, 621 F.2d 141 (5th Cir. 1980), *aff'g*, 456 F. Supp. 1035 (N.D. Ga. 1978) ..... *passim*
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 8
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 9
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 3
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 8
Noto v. United States, 367 U.S. 290 (1961) 1, 2
Simon & Schuster, Inc. v. New York Crime Victims Board, 502 U.S. 105 (1991) 4
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 8, 9
The Florida Star v. B.J.F., 491 U.S. 524 (1989) 8, 9
Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) 9, 10
United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) 7
United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978) 7
United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983) 7

TABLE OF AUTHORITIES—Continued

Page

United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) 7
United States v. Kelley, 769 F.2d 215 (4th Cir. 1985) 1
United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) 2
Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489 (1982) 4
Winters v. New York, 333 U.S. 507 (1948) 4

STATUTES

Ga. Code § 26-9912 4

MISCELLANEOUS

141 Cong. Rec. S7684 (daily ed. June 5, 1995) (statement of Sen. Feinstein) 2

REPLY BRIEF OF PETITIONER PALADIN ENTERPRISES, INC.

Petitioner Paladin Enterprises, Inc. ("Paladin") respectfully submits this Reply to Respondents' Brief in Opposition ("Opp.") to its Petition for a Writ of Certiorari ("Petition") filed herein.

1. The appropriate reach of this Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is—as Respondents implicitly concede, *see* Opp. at 14-22—at the center of this case. It is also at the heart of ongoing congressional efforts to legislate restrictions on the public availability of information that may prove useful to criminals. *See* App. 141a-223a.[1] In *Brandenburg*, this Court *held* that expression that champions the "use of force or of law violation" forfeits its claim to constitutional protection only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," 395 U.S. at 447, a holding that would appear on its face to preclude Respondents from maintaining this civil action against this Petitioner, *see* App. 74a-99a (district court's opinion). The Court of Appeals, however, has concluded that *Brandenburg*'s application should be limited to "abstract advocacy," a concept that apparently " 'envelops critical, but abstract, discussions of existing laws,' " but not Petitioner's book or other " 'speech which urges listeners to commit violations of current law,' " App. 25a (quoting *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985)), or otherwise "prepare[s]" or "steel[s]" them for illegal action in the future, App. 65a (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)). The Department of Justice has pronounced the issue a "difficult" one and, in marked contrast to the Fourth Circuit, has candidly acknowledged that "a 'generalized' attempt to aid crime through publication is 'not the same as preparing a group for violent action.' " App. 204a (quoting *Noto*). Senator Feinstein,

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[1] References to the Appendix to the Petition are denoted herein as "App." References to the Joint Appendix in the Court of Appeals are denoted as "J.A."

the principal sponsor of the aforementioned legislation, has asserted that "over twenty years" have now passed since this Court decided *Brandenburg* and that it therefore "may be time, especially in light of Oklahoma City and the World Trade Center bombings, for the Supreme Court to deal with this issue again." 141 Cong. Rec. S7684 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

2. For their part, Respondents assert that there is no need for the Court to "deal with this issue again." Instead, Respondents endorse the Fourth Circuit's suggestion that *Brandenburg*'s solitary citation to *Noto v. United States*, 367 U.S. 290 (1961), establishes that the First Amendment "does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense." Opp. at 14. The distillation of such a constitutional rule from *Brandenburg*'s isolated reference to *Noto* is, as the Fourth Circuit and the Justice Department have each conceded, *see* App. 64a-65a, 204a, less than clear from the text of this Court's opinions in either case. On its face, *Noto* speaks only to the role of the First Amendment in "closed group" settings in which words are used to further a clandestine group's criminal designs. *See* 367 U.S. at 297-98.[2] By the same token, this

[2] In this regard, the hypothetical conjured by Respondents, *see* Opp. at 16, begs the relevant constitutional question. If the hypothetical envisions a "closed group" setting in which like-minded Klansmen secretly conspire to commit violent and illegal acts, there is a credible argument that *Noto* remains good law and that *Brandenburg* does not apply, a distinction that Paladin advanced below and the Fourth Circuit dismissed in a footnote. *See* App. 62a n.9. Even if the scenario described in Respondents' hypothetical occurred in a public place in the presence of television camera crews (as in *Brandenburg* itself), the Klansmen could surely be prosecuted for aiding and abetting a murder if—as the hypothetical suggests—the information disseminated served no purpose for its intended audience other than the facilitation of crime. *See* Petition at 23 & n.21 (quoting *United States v. Mendelsohn*, 896 F.2d 1183, 1185 (9th Cir. 1990) (bookmaking program distributed only to audience of would-be criminals)). But, if the information were

Court has never extended *Noto*'s reach to expression disseminated to a mass, public audience, whether it is gathered in an open field surrounded by television cameras as in *Brandenburg* itself, massed on a city street as in *Hess v. Indiana*, 414 U.S. 105 (1973), seated in a public auditorium as in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), or receiving advertisements directed to the public at large as in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). Perhaps most significantly, the Fourth Circuit's effort, seconded by Respondents, to transform *Brandenburg*'s unadorned citation to *Noto* into a reformulation of its otherwise unambiguous holding conflicts with the lion's share of scholarly commentary about that landmark decision, which has rightly praised its central role in disavowing the narrow conception of the First Amendment previously articulated in cases such as *Noto*. *See* Petition at 16-17 & n.16. For all of these reasons, the decision below cannot reasonably be reconciled with *Brandenburg*.

3. Even accepting *arguendo* that the Fourth Circuit's holding represents its effort to come to grips with what it characterized as "elliptical" guidance emanating from *Brandenburg*, Respondents cannot wish away the conflict its decision creates in the lower courts. The Fourth Circuit unambiguously holds that, even when—as in this case—the expression at issue is disseminated to a mass audience of undifferentiated readers, *Brandenburg*'s application is limited to "abstract discussions of existing laws" and related "discourse critical of government, its policies, and its leaders." App. 32a. The cases referenced in the Petition at pages 19-24, most notably the Fifth Circuit's decisions in *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141 (5th Cir. 1980), and *Herceg v. Hustler Maga-*

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disseminated to a mass, undifferentiated audience for which it served a variety of lawful purposes, as Respondents have *stipulated* in this case, the Klansmen would properly be subject to criminal prosecution or civil liability based on their expression only if it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," as required by *Brandenburg*. 395 U.S. at 447.

zine, Inc., 814 F.2d 1017 (5th Cir. 1987), expressly embrace the contrary proposition and hold that *Brandenburg* applies to expression that bears no resemblance to the "abstract advocacy" described by the Fourth Circuit here. Respondents cannot harmonize this plain conflict in the circuits by observing that, in *Herceg*, the magazine's detailed instructions came adorned with a disclaimer of any intent that they be followed. *See* Opp. at 14. In fact, the disclaimer before the Fifth Circuit in *Herceg* is remarkably similar to the one prominently featured in *Hit Man* and summarily rejected as at all relevant by the Fourth Circuit here. *Compare Herceg v. Hustler Magazine, Inc.*, 814 F.2d at 1024 *with* App. 63a n.10.[3]

4. Respondents' inability to harmonize the Court of Appeals' decision with those of other circuits is illustrated most starkly by their brief footnote addressing the Fifth Circuit's contrary holding in *High Ol' Times, Inc. v. Busbee*. *See* Opp. at 12 n.4. In *Busbee*, the Fifth Circuit held unconstitutional a Georgia statute, Ga. Code § 26-9912, which made it a crime to "disseminate information primarily for one or more of the following purposes: (d) to . . . describe, explain, depict or display any method by which a dangerous drug or controlled substance may be obtained or produced."[4] In support of the statute, the

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[3] Respondents' further effort to distinguish *Herceg*—by suggesting that it involves an article presented for "artistic, entertainment, or educational purposes," Opp. at 13—cannot be reconciled with their *stipulation* in this case that *Hit Man* as well is marketed to a broad audience for which it serves *identical* salutary purposes. *See* App. 17a n.2 ¶¶ 5.a. & 5.b. Indeed, Respondents' contention that *Hit Man* contains no "political or social discourse," Opp. at 17, is both contrary to the undisputed record, *see* Petition at 5-6, 12-13 n.11, and well settled law, *see, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The commission of crime . . . [is] without question . . . of legitimate concern to the public . . . ."); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991); *Winters v. New York*, 333 U.S. 507 (1948).

[4] Contrary to Respondents' suggestion, *see* Opp. at 13 n.4, no such provision was contained in the "headshop" law upheld by this Court in *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) ("The ordinance . . . does not prohibit or otherwise regulate the sale of literature itself.").

State explained that it was designed to reach books such as *The Whole Drug Manufacturers Catalogue*, which contained detailed formulae, instruction, and diagrams depicting the laboratory apparatus and configuration necessary to synthesize and produce at least 22 illegal drugs and controlled substances. *See* J.A. 127. For example, the book—which the State introduced in evidence in *Busbee* and Petitioner entered in the record below in this case—contains the following section concerning the "Synthesis of Methamphetamine":

> This process is a complete laboratory guide to making meth crystal. It uses non-restricted chemicals, unlike most speed formulas, and includes illustrations of the complete lab set-up, a list of all the supplies with exact sizes, amounts, and all other info needed to purchase what is required. The instructions are explicitly detailed and are easy to follow. . . .
>
> Set up the reaction flask as shown in figure #5. The nitrogen is turned on and the system is flushed.
>
> Add to the flask 16.2 grams of magnesium turnings and 66.6 milliliters of anhydrous ether.
>
> Next is added a small crystal of iodine and 25 ml of a solution of 84.3 ml of benzyl chloride dissolved in 333.3 ml of anhydrous ether. . . .

J.A. 138. Unambiguously holding that *Brandenburg* protected such "instruction," the Fifth Circuit affirmed the district court's conclusion that "[r]easonable minds could not differ, the requisite seriousness of threat and imminence of action are not presented in *any* of the sample material entered into evidence. . . . The test of 'inciting or producing imminent lawless action' in *Brandenburg v. Ohio, supra*, is simply not satisfied by the plaintiffs' sale or display of the books, magazines, and posters exemplified herein." 456 F. Supp. at 1040 (emphasis added). In stark conflict with the decision in this case, therefore, the Fifth Circuit in *Busbee* held that *Brandenburg* prohibited "the imposition of liability for specific training intended to facilitate criminal acts." Opp. at 12 n.4.

5. Most recently, the Eleventh Circuit has applied *Brandenburg* to invalidate an Alabama statute prohibiting expenditure of public funds to finance expression that "provides information . . . . that explain[s] how" illegal acts such as sodomy "may be engaged in or performed" (while expressly exempting from its prohibitions "political advocacy of a change in the sodomy and sexual misconduct laws of this state"):

> It is well-established that the First Amendment protects advocacy to violate a law. *Brandenburg v. Ohio*, 395 U.S. [at 448-49]. That protection is limited in one important respect: The First Amendment does not "permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to *inciting or producing imminent lawless action and is likely to incite or produce such action.*" *Id.* at 447.

Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1545, 1547-48 (11th Cir. 1997). The Eleventh Circuit's holding, which like *Busbee* and *Herceg* simply cannot be reconciled with the decision below, declared the above-referenced statutory language unconstitutional despite its exemption of the kind of "abstract advocacy" referenced by the Fourth Circuit here. According to the Eleventh Circuit, a court "would have to ignore the Supreme Court's instructions and rewrite the statute for it to pass constitutional muster because advocacy to violate the law is protected speech unless directed to inciting or producing imminent lawless action." *Id.* at 1550.

6. The aforementioned conflict in the circuits is not erased by the Court of Appeals' observation, echoed by Respondents, that "'*every* court that has addressed the issue . . . has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.'" Opp. at 2 (quoting App. 22a). Petitioner has never advanced the position that the First Amendment "necessarily" erects a "bar" to such liability simply because it involves the "spoken or written word." Such an argument—which the

Ninth Circuit has rightly labeled a "specious syllogism," *see United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982)—has no relevance either to the district court's decision in this case or to the analogous decisions of at least four other circuits that have applied *Brandenburg* in a variety of settings in which the written or spoken word was alleged to facilitate criminal conduct, *see* Petition at 21-23 & n.21.[5] Thus, contrary to Respondents' suggestion, *see* Opp. at 9-10, the Ninth Circuit applied *Brandenburg* in *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), and in the other cases cited in the Petition at page 22 n.21, an exercise that would have been unnecessary if, as Respondents contend, the First Amendment is of no relevance whenever words are used to "aid and abet" a crime. *See also Bond v. Floyd*, 385 U.S. 116 (1966) (statute criminalizing expression that "aids and abets" draft resistance must comport with First Amendment). Indeed, several cases cited by Respondents for the unremarkable proposition that the First Amendment imposes no *absolute* bar to criminal prosecution for aiding and abetting crimes through speech, *see* Opp. at 10-12, so state only in the course of finding that the expression at issue constituted actionable "incitement to imminent lawless action" as required by *Brandenburg*. *See, e.g., United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978).

7. Respondents' final effort to avoid the plain conflict created by the Court of Appeals' reformulation of the *Brandenburg* standard is premised on the "second and alternative basis for its ruling," *i.e.*, that "at the very least, the Respondents were entitled to a jury trial under the *Brandenburg* standard" because Petitioner has stipulated

[5] Respondents' effort to explain away the conflict between the decision below and *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), on the ground that the government there "attempted to prosecute the defendants for doing nothing more than promoting and publishing a *legal* tax shelter program," Opp. at 9 n.3, is demonstrably in error. In *Dahlstrom*, the Ninth Circuit expressly predicated its holding on the assumption that "the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally." 713 F.2d at 1428.

to the requisite intent to sustain a criminal conviction for "aiding and abetting." Opp. at 3 (citing App. 64a n.11). This "alternative" holding—dispensed by the Court of Appeals in a brief footnote—erroneously substitutes the publisher's subjective intent for the objective inquiry mandated by *Brandenburg* and its progeny, *see* Petition at 17-18, and improperly reads the "imminence" requirement out of the *Brandenburg* standard. In any event, the so-called "alternative holding" is a red herring on its own terms, included as it is in a decision that otherwise devotes 71 printed pages to informing the district court that *Brandenburg* is irrelevant to the case such that a jury instruction or further motions practice invoking *Brandenburg* would be plain error.[6]

8. Despite the fact that it is the subject of substantial analysis by both the Department of Justice, *see* App. 186a-93a, and by Petitioner below, Respondents continue to misapprehend the relevance of *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), to this case. Both decisions, as Respondents are quick to assert, hold that the publication of lawfully acquired information may not constitutionally form the basis of civil or criminal liability absent a governmental interest of "the highest order." Opp. at 4

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[6] Much of Respondents' submission in this Court is devoted to an argument *not* embraced by the Court of Appeals—*i.e.*, their assertion that Petitioner's stipulated "intent," standing alone, is sufficient to render *Hit Man* unprotected by the First Amendment. *See* Opp. at 1-2, 21. By citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to support this contention, *see* Opp. at 21, Respondents have the law exactly backwards. The speaker's motives, *Sullivan* holds, may—if sufficiently innocent—serve to *extend* protection to expression that would otherwise fall beyond the reach of the First Amendment, such as defamatory falsehoods. There is simply no basis in First Amendment jurisprudence for Respondents' far different suggestion that the speaker's state of mind, standing alone, is sufficient to strip expression of First Amendment protection. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1998) ("[W]hile . . . a bad motive may be deemed controlling for purposes of tort liability . . . we think the First Amendment prohibits such a result in the area of public debate. . . .").

(citing *The Florida Star v. B.J.F.*, 491 U.S. at 533). As the Justice Department has observed, however, where—as in this case—the information is not only lawfully obtained, but *already publicly available from other sources,* this Court "has been unwilling to find that a restriction on publication of that information is 'narrowly tailored' to address a state interest" or that any " 'meaningful public interest' can be served by further restriction under such circumstances." App. 192a (quoting *The Florida Star v. B.J.F.*, 491 U.S. at 535). Accordingly, the Fourth Circuit's decision, which imposes liability on the publication of lawfully acquired information already in the public domain, *see* Petition at 25-26, conflicts with this Court's decisions in *The Florida Star* and *Daily Mail.*

9. Citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936), and *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622 (1994), Respondents assert that, even if the First Amendment standard articulated by the Fourth Circuit conflicts with *Brandenburg* and the subsequent decisions of other circuits, review by this Court is premature until after discovery and trial. Opp. at 2. *Ashwander*, however, has no relevance where, as here, the summary judgment entered by the district court and reversed by the Court of Appeals raises squarely and exclusively an issue of constitutional law. "Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 485-86 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974)). Indeed, in *Turner Broadcasting*, this Court in fact determined the appropriate First Amendment standard to govern the constitutional challenge at issue there and remanded solely for the development of a factual record to which that standard could be applied. In this case, the *only* question before this Court is the appropriate constitutional standard, a question that arises in the context of a stipulated

and unambiguous record, and is—as in *Turner Broadcasting*—properly resolved at this juncture.

10. In the last analysis, this Court's intervention is especially appropriate because, Respondents' protestations notwithstanding, this case is not "'unique in the law,'" Opp. at 25 (quoting App. 71a), and the constitutional standard articulated by the Fourth Circuit will—if not disavowed by this Court—deprive the public of a broad range of heretofore constitutionally protected expression. Although they make every effort to demonize this Petitioner and its book before this Court, the fact remains that Respondents have stipulated—and Paladin has independently demonstrated, *see* J.A. 90 ¶¶ 24-25 & 91 ¶¶ 27-28—that *Hit Man* was published for the purpose of providing, and did in fact provide, entertainment to an undifferentiated audience that harbors no criminal designs of any sort, as well as useful information to a readership that included, *inter alia*, law enforcement officers and mystery writers, *see* App. 17a n.2 ¶¶ 5.a & 5.b.[7] Thus, the array of books, magazines, newspaper articles, television reports, and motion pictures placed before the district court can, just as *Hit Man*, be fairly described as containing information useful to would-be criminals and "boldly proselytizing and glamorizing the crime of murder and the 'profession' of murder as it dispassionately instructs on its commission." App. 42a. If the potential for such "findings" is, as the Court of Appeals expressly holds, "more than sufficient to create a triable issue of fact as to" a publisher's intent, *id.*, and the publisher's pretrial protests to the contrary are, as Respondents contend, "at most" a misdirected "jury argument," Opp. at 26, then all of those works are now in jeopardy. Petitioner respectfully submits that the First Amendment cannot tolerate such a result.

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[7] Respondents, therefore, both mislead the Court when they selectively quote from the parties' stipulations, *see* Opp. at 1, and affirmatively distort the record to which they stipulated when they represent that "Paladin published a murder manual intended to train killers, not a novel intended to entertain, or a news report intended to inform." Opp. at 25.

Respectfully submitted,

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